porting to authorize the same, are illegal, void, unconstitutional, and unenforceable, for the following reasons:

(1) The same create a direct and substantial burden upon interstate commerce, in direct conflict with Article I, Section 8, Paragraph 3, of the Constitution of the United States, giving to the Congress of the United States power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

That said 2% tax on gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or not; that in many instances this 2% sales tax will spell the difference between profit and loss, its ultimate effect will be to impede and discourage the conduct of this type of commerce.

(2) The same are prohibited by Section 202 of said Chapter 7 of the Laws of 1934, which provides in part:

"None of the taxes levied by this act shall be construed to apply to transaction in interstate or foreign commerce * * * which under the Constitution of the United States, the State of New Mexico is prohibited from taxing; nor to any businesses or transactions exempted from taxation [fol. 6] under the Constitution of the United States of the Constitution of the State of New Mexico;"

In explanation of both of the foregoing grounds, plaintiff contends that the publication of a newspaper which circulates in different states of the Union constitutes interstate commerce; furthermore that the sale in original packages of products other than in the states where originally manufactured or stored likewise constitutes interstate commerce; and that the advertising of such interstate commerce business, in order to promote and aid the same, and put in motion the interstate shipment of goods, makes such advertising, and all phases thereof, an indispensible instrumentality and an essential and fundamental part of interstate commerce; that such advertisements and contracts embracing the same themselves constitute interstate commerce and transactions in interstate commerce;

(3) Said tax would appear to be unlawful inasmuch as the imposition thereof creates a condition directly contrary to the expresed purpose and intent of the sales tax law. (See Section 204, Chapter 7, Laws of New Mexico of 1934).

Plaintiff, and publishers in a like position, have found

it impossible to pass the 2% tax on to the ultimate consumers of their products and service—viz.—the foreign advertisers. Being non-residents of New Mexico, they can in no way be benefited by the purposes of the tax, and the fundamental rule of taxation—that those who pay must in some way be benefited—is violated.

VII. That plaintiff is entitled to judgment against the defendants for the recovery of said sum of $80.27, paid under protest on September 10, 1935, as aforesaid, together with interest thereon at the rate of 6% per annum from September 10, 1935, until paid.

[fol. 7] Wherefore, plaintiff prays for judgment against the defendants, pursuant to Section 314, Chapter 7, Laws of 1934, and Section 1, Chapter 9, Laws of 1935, for the sum of $80.27, together with interest thereon at the rate of 6% per annum from September 10, 1935, until paid and for its costs herein expended, and for such other relief as may appear proper.

(Signed) D. A. Macpherson, Jr., Attorney for Plaintiff, 810 First National Bank Bldg., Albuquerque, New Mexico.

The foregoing Amended Complaint was duly verified by D. A. Macpherson, Jr., as attorney, on the 14th day of November, A. D., 1935, before Herbert Gerhart, Clerk, Supreme Court of New Mexico.

EXHIBIT "A" TO AMENDED COMPLAINT

Protest

State Tax Commission, Santa Fe, New Mexico.

GENTLEMEN:

The undersigned hands you herewith the sum of $80.27 in payment of taxes attempted to be levied by the terms of Chapter 7 of the Special Session Laws of 1934. This tax is being paid under protest under and pursuant to Section 314 of said Chapter.

We base our grounds of protest and question the legality of the tax so far as it is levied against foreign advertising sold and published in our paper upon the following:

Section 202 of the Act provides that it shall not apply to any transaction in interstate or foreign commerce, plainly

intending not to run counter to Article I, Section 8 of the Constitution of the United States of America which gives Congress the sole power "to regulate commerce with foreign nations and among the several states and with the Indian Tribes."

The contractual relations between the undersigned and the foreign advertisers were entered into in a foreign state and the advertised products and merchandise shipped inter-[fol 8] state. Advertising so contracted for in a state outside the confines of New Mexico is preliminary and incident to the hoped for sale of the goods advertised to be shipped interstate.

The enforcement of the Act therefore as against such foreign advertising is contrary not only to the Constitution of the United States, quoted supra, but to the plain provisions of the taxing act itself, and you are further notified that if the monies tendered are accepted and held by you, suit will be instituted to recover the same.

(Signed) Western Live Stock, by Frasier Biggs.

State of New Mexico,
County of Bernalillo, ss:

Frasier Biggs, being first duly sworn according to law, deposes and says: That he is the publisher of Western Live Stock, the company signing the above protest; that he has read the foregoing Protest, knows the contents thereof and that the same is true of his own knowledge.

(Signed) Frasier Biggs.

Subscribed and sworn to before me this 9th day of September, 1935. (Signed) Margaret Hartzell, Notary Public. My commission expires October 2, 1935. (Seal.)

In District Court of Santa Fe County

Demurrer—Filed November 27, 1935

Come now the defendants in the above entitled cause of action and demur to the complaint for the reason that same does not state facts sufficient to constitute a cause of action in that;

I. The complaint shows upon its face that the transactions described in the complaint between the plaintiff and

various advertisers in foreign states constitute mere contracts between residents of different states, and therefore, [fol. 9] do not constitute transactions in interstate commerce.

II. The complaint shows upon its face that transactions described in the complaint constitute mere contracts between the plaintiff and the various advertisers and that such contracts are merely incident to speculative transactions in interstate commerce.

III. Complaint shows upon its face that there exists in the minds of the advertisers a mere wish or desire that movements in interstate commerce will arise by virtue of such advertisements and that such advertisements are, therefore, too remote to constitute instrumentalities of interstate commerce.

IV. The complaint shows upon its face that even though the transactions described in the complaint constitute transactions in interstate commerce, nevertheless the complaint fails to show why such transactions would not be taxable inasmuch as section 202 of Chapter 7 of the Special Session Laws of 1934 only exempts such taxes when under the Constitution of the United States or the State of New Mexico such transactions could not be taxed and the complaint fails to show wherein such transactions as mere incidents of interstate commerce would not be taxable under the Constitution of the United States and of the State of New Mexico.

Frank H. Patton, Attorney General, Attorney for Defendants, Santa Fe, New Mexico.

IN DISTRICT COURT OF SANTA FE COUNTY

PETITION TO AMEND THE AMENDED COMPLAINT BY INTERLINEATION—Filed February 15, 1936

Comes now the above named plaintiff by its attorney, D. A. Macpherson, Jr., and moves the court to allow the [fol. 10] amended complaint on file herein to be amended by interlineation in the following particulars, to-wit:

That in Paragraph (IV) of said amended complaint, in the nineteenth (19th) line, following the words "foreign advertisers residing outside of New Mexico" there be inserted the following additional allegation: "that as regards

the newspaper advertising business done by plaintiff for advertisers located outside of New Mexico, the contracts negotiated and entered into with such advertisers provide for and contemplate a continuous passage of contracts, correspondence, plat-s, cuts, mats, engravings, copy, intelligence and information from the advertiser across state lines to plaintiff, the printing of such advertising in its journal, and its circulation and distribution in such journals by means of motor trucks, railroads, express and the United States mails throughout the states of the United States, all constituting one inseparable interstate business relationship, and that only after the full and faithful completion and performance of each of such necessary component and related steps is plaintiff entitled to secure payment for such interstate business and will payment of the consideration therefor pass from the out-of-state advertisers to plaintiff, and only until then can plaintiff be said to have completed and performed its service of newspaper advertising in accordance with its contracts for such advertising. Plaintiff further alleges that it cannot segregate or discontinue its interstate and foreign advertising and business from its intrastate and local advertising and business and that to discontinue its interstate and foreign advertising would force plaintiff to give up its business and close."

Plaintiff further moves that Paragraph VI, Subsection (1), be amended by there being added at the end of said section and just before Subsection (2), the following lan-
[fol. 11] guage: "Plaintiff specifically alleges that a two per cent (2%) tax on the gross receipts of a portion of its advertising in which the net profit without the tax is small has resulted in said advertising being printed by plaintiff at a loss."

D. A. Macpherson, Jr., Attorney for Plaintiff, 810 First National Bank Bldg., Albuquerque, New Mexico.

IN DISTRICT COURT OF SANTA FE COUNTY

ORDER PERMITTING AMENDMENTS TO AMEND COMPLAINT BY INTERLINEATION—Filed February 15, 1936

The court considering the petition of plaintiff to amend its amended complaint herein by interlineation, and finding that said petition should be granted,

Now, Therefore, it is Hereby Ordered that said petition be granted and said amended complaint considered further amended by interlineation in the particulars set forth in said petition.

M. A. Otero, Jr., District Judge.

IN DISTRICT COURT OF SANTA FE COUNTY

FINAL JUDGMENT, ORDER OVERRULING DEMURRER AND ALLOWING APPEAL—Filed February 20, 1936

This cause coming on to be heard upon the Demurrer filed by the above named defendants, plaintiff appearing by its attorney, D. A. Macpherson, Jr., and defendants appearing by Honorable Frank H. Patton, Attorney General for the State of New Mexico, plaintiff having prior thereto filed its Petition to Amend the Amended Complaint by Interlineation, and the court having signed an order permitting said [fols. 12-15] amendments set forth therein, and the court having heard the arguments of attorneys for plaintiff and defendants and being fully advised, finds:

That said Amended Complaint of plaintiff sets forth a good cause of action and that the foreign advertising, as therein described is interstate commerce and constitutes transactions in interstate commerce; that the tax on said foreign advertising constitutes a burden on interstate commerce and is illegal and void; and that said Demurrer should be overruled.

Wherefore, it is Ordered, Adjudged and Decreed that the Demurrer on file herein be and the same is hereby overruled, to all of which the defendants, by their attorney, Honorable Frank H. Patton, Attorney General for the State of New Mexico, duly objects and excepts and said attorney for defendants announcing that he refuses to plead further and stands on his Demurrer,

It is Ordered and Adjudged that final judgment issue, and it is therefore further ordered, adjudged and decreed that plaintiff recover in accordance with the prayer of the complaint from defendant the sum of Eighty and 27/100 Dollars ($80.27), together with interest thereon at the rate of six per cent (6%) per annum from September 1, 1935, until paid.

Whereupon defendants praying for an appeal to the

Supreme Court of New Mexico, it is Ordered and Adjudged that said appeal be and the same is hereby granted.

It is Further Ordered and Adjudged that the allowance of said appeal act as a stay of execution.

M. A. Otero, Jr., District Judge.

Approved: Frank H. Patton, Attorney General, Attorney for Defendants.

[fol. 16] IN SUPREME COURT OF NEW MEXICO

Cause No. 4210

OPINION—Filed February 22, 1937

The plaintiffs (appellees) sued in the district court of Santa Fe County to recover taxes in the sum of $80.27, paid under protest, imposed by the provisions of Chapter 7 of N. M. Session Laws of 1934 (Special Session) based upon the receipts arising from certain advertising. Section 314 of the Act extends authority to seek recovery by suit of taxes so paid on conditions therein named.

Judgment was rendered against defendants following their refusal to plead further upon entry of the trial court's order overruling a demurrer interposed by them to plaintiffs' amended complaint, hereinafter referred to as the complaint. They prosecute this appeal to secure a correction of the judgment claimed to be erroneous.

The essential facts, as disclosed by the complaint, are these. The plaintiffs are partners operating under the firm name of Western Live Stock. Their business is the publication of a trade journal or magazine at Albuquerque, New Mexico, known as "Western Live Stock." It has a general circulation in New Mexico and other states. It is circulated by means of the United States mails, motor trucks, railroads and express.

One of plaintiffs' sources of revenue is, of course, advertising. The magazine receives and publishes, under contracts, advertisements of products which are manufactured elsewhere than in New Mexico, such products to be sold, shipped and transported from the manufacturer to the customer. These foreign advertisements are obtained by plaintiff both through personal solicitation and through what are known as advertising agencies, located in states

other than New Mexico. Some of these advertising con-
[fol. 17] tracts are made between plaintiffs and the manufacturer, located in a foreign state, while others, as stated, are made between the plaintiffs and an advertising agency, such advertising agency having a different and a separate contract with the manufacturer and in such cases all dealings in connection therewith are between the plaintiffs and the agency.

In the preparation of the advertisements for insertion in the plaintiffs' magazine, certain advertising cuts, mats, material, information, intelligence and copy are sent to plaintiffs by said foreign advertisers, and plaintiffs receive compensation pursuant to the contract to carry the advertising from such foreign advertisers, and the receipts arising from such advertising contracts form the measure of the tax imposed in its application to plaintiffs.

This advertising is naturally designed to promote the sale of the advertised products. The advertising contracts so made with residents of other states require an interchange of correspondence between the advertiser and plaintiffs, contemplate the forwarding prior to publication of plat-s, cuts, mats, engravings, copy and information from outside the state to plaintiffs within the state, as aforesaid, and the circulation and distribution of such magazines to subscribers and purchasers in New Mexico and other states.

The challenge to the act laid as a basis of recovery is briefly that the act, in the respect sought to be enforced against plaintiffs, violates section 8 of Article I of the Constitution of the United States, known as the "Commerce Clause", by placing an unconstitutional burden on interstate commerce. The gist of the demurrer, likewise in brief, is that under the facts pleaded it does not.
[fol. 18] The tax assailed is imposed by section 201 of said Chapter 7, Special Session Laws of 1934, reading as follows:

"There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:

As applicable to plaintiffs the measure of the tax is prescribed by sub-paragraph I of section 201, reading:

"At an amount equal to two per cent of the gross receipts of any person engaging or continuing in any of the following businesses: * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space), * * *."

The plaintiffs chiefly rest their argument supporting correctness of the trial court's ruling on the demurrer on certain state and federal cases, to-wit, Post Printing & Publishing Co. v. Brewster (U. S. D. C.) 246 Fed. 321; State v. Salt Lake Tribune Pub. Co., 68 Utah 187, 249 P. 474; Little v. Smith, 124 Kan. 237, 257 P. 959; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678; Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co., 293 U. S. 268, 79 L. ed. 356; and the case of Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 80 L. ed. 956, decided March 30, 1936.

[fol. 19] A careful analysis of these cases in the light of what is said in Blumenstock Brothers Advertising Agency v. Curtis Publishing Company, 252 U. S. 436, 64 L. ed. 649, and in Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357, and in other cases cited and relied upon in the Blumenstock case, fails to persuade us that the advertising contracts themselves, although made between citizens of different states, are transactions in interstate commerce. That they are not so is the first point relied upon by the defendants for reversal. We rule the point in their favor. Indeed, the mere contracts are not commerce at all, neither intrastate nor interstate; no more so than contracts of insurance and they have been held to be neither. New York Life Insurance Co. v. Deer Lodge County, 231 U. S. 495, 58 L. ed. 332. Cf. Graniteville Mfg. Co. v. Query et al., 44 Fed. (2d) 64.

The Blumenstock case, supra, was a suit by plaintiff, a Missouri corporation, against the defendant, a Pennsylvania corporation, to recover treble damages under the Sherman Anti-trust Act. Section 2 of said act rendered unlawful any monopoly or attempt to monopolize any part of the trade or commerce among the several states. Section 7 of the same act authorized the recovery of treble damages sustained by any person in his business or prop-

erty by reason of anything forbidden or declared unlawful by the act. Sustaining the contention that the petition failed to state a cause of action, the court said:

"Commerce, as defined in the often quoted definition of Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. ed. 23, 68, is not traffic alone, it is intercourse,—'It describes the commercial intercourse between nations [fol. 20] and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.'

In the present case, treating the allegations of the complaint as true, the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce."

The plaintiffs seek to distinguish this case by pointing out that in it the court was dealing with the case of a refusal to contract while here is presented the case of completed contracts. We see no point to the attempted distinction.

The opinions in *Post Printing and Publishing Co.* v. Brewster, supra, by the late Judge Pollock of the United States District Court in Kansas; State v. Salt Lake Tribune Pub. Co., supra, by the Supreme Court of Utah; and Little v. Smith, supra, by the Supreme Court of Kansas, carefully appraised, simply hold that state legislation which directly burdens an instrumentality of interstate commerce —the publication and interstate circulation of newspapers as it happened to be in those cases—is unconstitutional. [fol. 21] Each case involved a penal statute prohibiting the advertising of cigarettes. Fundamentally, the decisions rest upon the interstate character of the business of the newspapers involved. That the publication and interstate

circulation of newspapers is interstate commerce may not be questioned. Blumenstock Brothers Adv. Agency v. Curtis Pub. Co., supra; Konecky v. Jewish Press (C. C. A. 8th Ct.) 288 Fed. 179. But this fact alone does not draw all incidents of such a business within the protection of the interstate commerce clause of the federal constitution.

Expressions are to be found in some, if not all, of the three opinions first cited in the paragraph next above reflecting the idea that the advertising contracts themselves are transactions in interstate commerce. This view is directly contrary to the holding in the Blumenstock case that they are not. It rejects the principle of New York Life Ins. Co. v. Deer Lodge County, supra, declaring mere contracts not commerce at all.

It is interesting to note that the Blumenstock case had not been decided when Judge Pollock wrote his opinion in the Brewster case. But it antedates the Salt Lake Tribune case from Utah by six and one-half years and the decision of the Supreme Court of Kansas in Little v. Smith by more than seven years. Yet in neither of the last mentioned cases is the decision in the Blumenstock case noticed. Apparently, the court in neither of these cases had the benefit of that opinion, as certainly Judge Pollock did not in the Brewster case, in indicating a view that advertising contracts may be deemed transactions in interstate commerce.

[fol. 22] In addition to the cases discussed, plaintiffs put great reliance upon two decisions of the United States Supreme Court already cited. They are Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co. and International Text Book Co. v. Pigg. Indeed, plaintiff's counsel contends the former case, having been decided subsequently to the Blumenstock case, overrules the latter to the extent of any conflict. When the real basis of the later decision is understood, we think there is no conflict.

The Indiana Farmer's Guide case was another suit to collect treble damages under the Sherman Anti-trust Act by reason of a violation of Sections 1 and 2 of the act. The plaintiff was the publisher of "The Indiana Farmer's Guide" at Huntington, Indiana, having a circulation of 160,000 of which over two-thirds was in Indiana and approximately 50,000 in other states. The defendants, except Midwest Farm Paper Unit, Inc., were publishers of newspapers, general and not vocational in character, the names

of such papers being calculated, however, to develop a circulation among farmers in the six midwestern states where published. The larger part of the circulation of each of these newspapers was in the state where published. Most of the advertisers in all the papers were located in states other than the state of publication, about ninety per cent of petitioner's advertising coming from points outside Indiana. The combination in restraint of trade was claimed to be by virtue of an arrangement through the Midwest Unit whose officers and agents were representatives of the other defendants. By virtue of this arrangement a combination rate of advertising in all seven papers was much less than the total of separate charges for the same advertisement in any six.

[fol. 23] In this case the court cites and discusses the Blumenstock case, distinguishing it upon the ground that the subject matter there dealt with, as recited in the opinion in such case, "was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant;" Whereas, said the court:

"The business that is here alleged to have been damaged is the publication and circulation of these farm papers. That business includes the obtaining of advertising, the transportation between States of electrotypes sent respectively to petitioner and respondents by their customers to be used in setting up advertisements and the transportation of substantial quantities of the papers in interstate commerce. Advertising at compensatory rates is an essential element. The opinion in Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U. S. 436, 64 L. ed. 649, 40 S. Ct. 385, supra, assumed that a publishing business such as that now under consideration would amount to interstate commerce. There is no ground for the contention that the evidence in this case is not sufficient to go to the jury on the question of interstate commerce." (Citations omitted.)

In the case at bar, the subject matter dealt with is the validity of an act imposing a tax measured by receipts arising (in the instant case) from contracts by citizens of other states with plaintiffs for insertion of advertisements in their magazine published in New Mexico. The mere fact that the magazine has an interstate circulation does not

give interstate character to the contracts. This was true of defendant's publications in the Blumenstock case.
[fol. 24] The substance of the material allegations in the petition in the Indiana Farmer's Guide case as recited by the court in its opinion is:

"that respondents entered into a contract, combination and conspiracy *for the purpose of obtaining a monopoly of the farm paper business* including the publication, circulation and distribution of advertisements of peculiar interest to farmers 'within the territory covered' by their publications; that in furtherance of this contract, combination and conspiracy they conceived a plan and design calculated to break down and destroy 'competition with other farm publications within said territory;' and that in order to effectuate that purpose they agreed upon a combination schedule of advertising rates for all their publications materially below the total of the separate rates of each." (Italics ours.)

The decisive allegation in this pleading is that which charges the doing of a thing declared unlawful by the Sherman Act, to-wit: the entering "into a contract, combination and conspiracy for the purpose of obtaining a monopoly of the farm paper business * * * 'within the territory covered' by their publications." Publication and circulation of these farm papers throughout the several states mentioned concededly was interstate commerce. The fact that such business included advertising at compensatory rates, contracts in reference to which were the means employed to effectuate the unlawful conspiracy, did not give interstate character to such contracts, even though between citizens of different states. We do not understand the opinion so to hold. Nor can we see the significance attached by plaintiffs to the court's mention of the farm paper busi-
[fol. 25] ness as including transportation between states of electrotypes to be used by the respondents in setting up advertisements. While not questioning the interstate character of such transportation, it was but an incident to the performance of the advertising contracts. Obviously, it seems to us, the transportation of these articles did not, in the court's mind, give decisive characterization as interstate commerce to the business involved, for at the very outset the court deduced that from the interstate circulation of the farm papers.

The transportation between states of the electrotypes falls within the distinction we draw between the case at bar and International Textbook Co. v. Pigg, also relied upon by plaintiffs. They argue that even if such a contract as that disclosed in the Blumenstock case be not deemed an interstate transaction, nevertheless, the interstate movement of advertising cuts, mats and copy contemplated by their contracts with advertisers makes such contracts and the performance thereof interstate transactions within the doctrine of the Pigg case,

But there is this difference between the two cases. In the Pigg case the continuous movement of text books, apparatus, letters of instruction and the like entered into the very essence of the contract. That movement was in constant execution and fulfillment of the contract itself—not a mere preliminary act incident to preparing one of the parties for performance as in the instant case. If plaintiffs be correct in this contention, a building contract between two residents of New Mexico for construction of a building in New Mexico will take on the characteristics of interstate commerce and be subject to federal regulation [fol. 26] by the mere circumstance that the contract calls for material of a certain kind whose purchase and delivery may involve a movement of goods in interstate commerce.

Furthermore, in view of the dismissal of the petition in the Blumenstock case for failure to state a cause of action for recovery of treble damages under the Sherman Act, we do not consider well founded plaintiffs' contention that advertising so promotes the sale of the goods advertised as to start their flow in interstate commerce, thereby characterizing same as an interstate transaction. Allegations of similar import appear in the petition in that case. This consideration seems too remote to be decisive and was evidently so considered by the court in the Blumenstock case.

The most that fairly can be said of the tax here imposed in its relation to plaintiffs' business, it seems to us, is that it indirectly affects interstate commerce. It is only such transactions as directly affect same and impose a direct burden thereon that fall within the interdiction of the commerce clause of the federal constitution. Schechter Poultry Corporation v. United States, 295 U. S. 495, 79 L. ed. 1570, 97 A. L. R. 947, and cases cited. See also Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160.

In the Schechter case, one ground urged in support of federal regulation of the live poultry industry of the metropolitan area in and about New York City was the power of Congress over interstate commerce. It was argued that hours and wages affect prices; that payment of lower wages or reducing cost by exacting long hours would enable the operator in the industry so doing to sell at lower prices, since labor represents 50 to 60 percent of these costs; that [fol. 27] this practice results in a demand for a cheaper grade of goods; and that the cutting of prices demoralizes the price structure. Interstate commerce was thus brought in only upon the charge that violation of certain Code provisions regulating the industry—as to hours and wages of employees and local sales—"*affected*" interstate commerce.

Holding against the contention that the claimed violations directly "affected" interstate commerce, the court, among other things, said:

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as e. g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal [fol. 28] authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control."

At most, the tax challenged affects only indirectly the interstate business of plaintiffs. So does the property tax they pay on tangible property located in New Mexico; and as well the property tax paid by an interstate carrier on its property having permanent situs in the taxing state, even though employed in interstate transportation of freight and passengers. But no more in the one case than in the other does this indirect burden relieve such property from bearing its just share of state taxation.

That the legislature did not intend to transcend provisions of the commerce clause of the federal constitution is shown by express language of the act. Section 202 of Chapter 7 thereof reads:

"None of the taxes levied by this act shall be construed to apply to transactions in interstate or foreign commerce, or commerce with Indian tribes."

We are not convinced that the act in its application to plaintiffs imposes an unconstitutional burden on interstate commerce. Controlled as we are by decisions of the United States Supreme Court on such matters, we have carefully weighed decisions cited from that court and believe our conclusion in harmony with them.

It follows that the trial court erred in overruling the demurrer of the defendants. Accordingly, the judgment [fol. 29] entered against them following their refusal to plead further will be reversed. The cause will be remanded to the district court of Sante Fe County with directions to sustain the demurrer and for further proceedings in conformity with the views herein expressed.

It is so ordered.

Daniel K. Sadler, Justice.

We concur: Andrew H. Hudspeth, Chief Justice. Howard L. Bickley, Justice. Charles R. Brice, Justice. A. L. Zinn, Justice.

[fols. 30-31] In Supreme Court of New Mexico

No. 4210

Judgment of Reversal—Entered February 22, 1937

This cause having heretofore been argued, submitted and taken under advisement, and the Court, being now suffi-

ciently advised in the premises, announces its decision by Justice Sadler, Chief Justice Hudspeth, Justices Bickley, Brice and Zinn concurring, reversing the judgment of the District Court for the reasons given in the opinion of the Court on file.

It is, Therefore, Considered, Ordered and Adjudged by the Court that the judgment of the District Court in and for the County of Santa Fe, whence this cause came into this Court, be and the same is hereby reversed and the cause is remanded to the District Court of Santa Fe County with directions to sustain the demurrer and for further proceedings in conformity with the views expressed in said opinion.

It is Further Ordered and Adjudged that appellants do have and recover their costs from appellee in this behalf expended to be taxed by the Clerk.

[fol. 32] IN DISTRICT COURT OF SANTA FE COUNTY

MOTION TO SUSTAIN DEMURRER—Filed March 23, 1937

Comes now the Bureau of Revenue and John A. Bingaman, Commissioner of Revenue, by and through their attorney move the Court to sustain the Demurrer pursuant to directions of the Supreme Court in the opinion rendered in said cause of action on appeal upon the 22nd day of February, 1937, which said Demurrer was heretofore argued and overruled by this court before said appeal was granted.

(Signed) Frank H. Patton, Frank H. Patton, Attorney General of N. M.

[fol. 33] IN DISTRICT COURT OF SANTA FE COUNTY

ORDER SUSTAINING DEMURRER—Filed March 23, 1937

This matter coming on before the Court for hearing upon motion of defendants to sustain a demurrer heretofore filed in said cause and the court being sufficiently advised in the premises and being advised particularly that the Supreme Court of the State of New Mexico, on the 22nd day of February, 1937, rendered an opinion in said cause of action remanding same to the District Court of Santa Fe County with directions to sustain the demurrer,

Now, Therefore, it is hereby Ordered and Adjudged that the said demurrer, pursuant to said directions of the

Supreme Court of the State of New Mexico, be and the same hereby is sustained, to all of which the plaintiffs object and except.

(Signed) David Chavez, Jr., District Judge.

In District Court of Santa Fe County

Refusal and Inability by Plaintiff to Plead Further—Filed April 22, 1937

Comes now the above named plaintiff by its attorney, D. A. Macpherson, Jr., and announces to the Court that it refuses to further amend its amended complaint on file herein and further states that it is unable to do so. Plaintiff alleges that its amended complaint on file herein contains each and every allegation that it is possible to allege in order to establish and set forth its cause of action; that there are no other facts or circumstances that it could possibly allege; that plaintiff accordingly stands on its amended complaint herein and refuses and is unable to plead further.

(Signed) D. A. Macpherson, Jr., Attorney for Plaintiff.

[fol. 34] In District Court of Santa Fe County

Motion for Final Judgment—Filed April 22, 1937

Come now the above defendants, by Frank Patton, Attorney General of New Mexico, and show to the Court:

That following the decision of the Supreme Court of New Mexico on the appeal of this cause, a mandate was sent to this Court, directing that its former order overruling defendants' demurrer be reversed and further directing that the defendants' demurrer be now sustained; that pursuant thereto this Court has entered an order sustaining said defendants' demurrer to plaintiff's amended complaint; that plaintiff has subsequently announced to the Court its inability and refusal to plead further, plaintiff alleging that its amended complaint contains all of the facts and circumstances it is able to allege to set forth a cause of action; and that plaintiff elects to stand on said amended complaint; that in view of said position taken by plaintiff that the Court should enter final judgment herein against plaintiff and in favor of defendants.

Wherefore, defendants move that the Court dismiss plaintiff's amended complaint with prejudice, and enter final judgment against plaintiff and in favor of defendants.

(Signed) Frank H. Patton, Attorney General of New Mexico, Attorney for Defendants.

[fol. 35] In District Court of Santa Fe County

Final Judgment—Filed April 22, 1937

[On left margin:] O. K., F. H. P. O. K., D. A. M., Jr.

This cause coming on to be heard upon the motion of defendants for final judgment, plaintiff appearing by its attorney, D. A. Macpherson, Jr., and defendants appearing by Honorable Frank H. Patton, Attorney General for the State of New Mexico, and the Court having examined the pleadings and record in this cause and finding that in accordance with the mandate from the Supreme Court of New Mexico following defendants appeal herein, this Court has sustained the defendants' demurrer to the amended complaint on file herein; that subsequent thereto plaintiff has announced its refusal and inability to amend further its amended complaint herein, plaintiff alleging it has in said amended complaint set forth all facts and circumstances it possibly could allege in order to establish a cause of action and plaintiff further announcing it elects to stand on said amended complaint, and the Court having heard arguments for attorneys and being fully advised, finds:

That a complete determination of this suit on its merits has been made and all issues between the parties adjudicated, and that final judgment should be entered against plaintiff and in favor of defendants.

Wherefore, it is Ordered, Adjudged and Decreed that a final judgment issue and that the cause of action of plaintiff, as set forth in its amended complaint on file herein, be and the same is hereby dismissed with prejudice and that all relief prayed for by plaintiff be denied.

[fols. 36-39] It is Further Ordered, Adjudged and Decreed that the amount of tax paid by plaintiff under protest, to-wit; the sum of $80.27, and held by defendants in the Emergency School Suspense Fund as established by law, be and the same is hereby ordered released therefrom and ordered

paid into the Emergency School Fund and thereafter distributed as provided by law.

It is Finally Ordered that defendants recover their costs herein. To all of which plaintiff objects and excepts, which exceptions are allowed.

(Signed) Thomas J. Mabry, District Judge of the Second Judicial District, Sitting at the Designation and Request of David Chavez, Jr., Judge of the First Judicial District in and for Santa Fe County, New Mexico, now absent.

[fol. 40] IN SUPREME COURT OF NEW MEXICO

Cause No. 4310

OPINION—Filed May 10, 1937

Per CURIAM:

This is the second appeal of this case. For the facts see our former opinion, Western Live Stock v. Bureau of Revenue, 41 N. M. —, 65 P. (2d) 863. Broadly, but a single issue was presented on the former appeal, namely, whether C. 7, N. M. Session Laws of 1934 (Special Session), in its application to plaintiffs, operates as an unconstitutional burden on interstate commerce. We held that it does not, reversing the judgment in plaintiffs' favor by the district court of Santa Fe County, and remanded the cause to said court with directions to set aside its judgment and to sustain defendants' demurrer. "Interstate commerce" was put into the case through plaintiffs' claim that advertising contracts between them and out-of-state advertisers, and certain acts incident to performance of such contracts, constitute interstate transactions.

The district court of Santa Fe County, following the directions of our mandate, duly entered an order sustaining defendants' demurrer. Thereupon plaintiffs filed a written declaration of inability to amend and of refusal to plead further. The district court then rendered judgment against the plaintiffs, dismissing their complaint with prejudice. They seek a review of that judgment by this appeal.

The matter is before us upon the former record and a new transcript supplementing same, showing the proceedings subsequent to mandate. The parties have stipulated that

the briefs filed by counsel for the respective parties on the [fol. 41] former appeal shall be considered by the court as their briefs on this appeal. We thus have before us the same question, presented on the same record (with the addition of the above mentioned proceedings subsequent to mandate contained in the new transcript) and the same briefs. Obviously, the issue thus presented is ruled and foreclosed by our decision on the former appeal. It follows that the judgment of the district court must be affirmed.

It is so ordered.

Andrew H. Hudspeth, Chief Justice. Daniel K. Sadler, Justice. Charles R. Brice, Justice. A. L. Zinn, Justice.

Bickley, J., being absent, did not participate.

[fol. 42] In Supreme Court of New Mexico

Judgment of Affirmance—Entered May 10, 1937

This cause having heretofore been submitted and taken under advisement, and the Court, being now sufficiently advised in the premises, announces its per curiam decision, Chief Justice Hudspeth, Justices Sadler, Brice and Zinn participating, Justice Bickley being absent, affirming the judgment of the District Court for the reasons given in the opinion of the Court on file.

It is, Therefore Considered, Ordered and Adjudged by the Court that the judgment of the District Court in and for the County of Santa Fe, whence this cause came into this Court, be and the same is hereby affirmed.

[fol. 43] In Supreme Court of New Mexico

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed June 18, 1937

Petition for Appeal

Considering themselves aggrieved by the final decision of the Supreme Court of the State of New Mexico, in the above entitled cause, the plaintiffs therein, Western Live Stock, a partnership composed of Frasier Biggs and D. F. Biggs,

hereby pray an appeal to the Supreme Court of the United States and for an order fixing the amount of the bond thereon, and show to the Court, in support thereof, that the case is one in which there was drawn in question the validity of a statute of the State of New Mexico on the ground of its being repugnant to the Constitution of the United States and the decision of the Supreme Court of the State of New Mexico is in favor of the validity of said statute.

Assignment of Errors

And appellants assign the following errors of the Court below:

1. The Supreme Court of New Mexico erred in failing and refusing to hold (a) that advertising contracts between appellants and out-of-state advertisers, which required the interstate transmission of advertising copy and materials, the printing of the magazines, and distribution to appellants' subscribers throughout various states of the Union, and ultimate payment being made to appellants in New Mexico from across state lines, amounted to interstate commerce; (b) that said advertising contracts, which both promoted and resulted in the interstate shipment of the advertised goods, constituted interstate commerce.

2. The Supreme Court of New Mexico erred in failing and refusing to hold that Chapter 7 of the Special Session Laws of 1934, imposing a sales tax of 2% on the gross proceeds of [fol. 44] appellants' advertising from out-of-state or foreign advertisers, placed a direct and substantial burden on interstate commerce, and is accordingly repugnant to Article I, Section 8, of the Constitution of the United States, illegal and void.

Prayer for Reversal

For which errors the appellants pray that said judgment and decision of the Supreme Court of the State of New Mexico, dated May 10, 1937, in the above entitled cause, be reversed and a judgment rendered in favor of said appellants, and for costs.

(Signed) D. A. Macpherson, Jr., Counsel for Appellants.

[fols. 45-56] IN SUPREME COURT OF NEW MEXICO

ORDER ALLOWING APPEAL—Filed June 18, 1937

The appellants in the above entitled suit having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of New Mexico on the 10th day of May, 1937, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of New Mexico in the above entitled cause, as provided by law, and it is further ordered that the clerk of the Supreme Court of the State of New Mexico shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within 45 days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of Five Hundred Dollars ($500.00).

Dated June 18th, 1937.

(Signed) Andrew H. Hudspeth, Chief Justice of the Supreme Court of the State of New Mexico.

[fol. 57] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed August 16, 1937

Appellant intends to rely upon the following points:

1

A newspaper or magazine circulating over an area embracing various states is engaged in interstate commerce.

2

Advertising published in a newspaper or magazine circulating over an area embracing various states likewise becomes interstate commerce.

3

Advertising contracts between a newspaper or magazine published in one state and advertisers residing in other states stipulating for the transmission between the contracting parties of the advertising copy and materials, stipulating for the printing of the advertising, and the distribution of the newspapers or magazines containing the same to the subscribers and readers thereof who reside in numerous states of the Union and ultimately providing for payment for said advertising constitute instrumentalities of inter-[fol. 58] state commerce and are in effect interstate commerce.

4

The sale of products in the original package to purchasers residing in states other than where said products are originally manufactured or stored constitutes interstate commerce. Advertising by out-of-state advertisers directly promotes, aids, and results in the sale of such products, which are thereby transmitted in interstate commerce. Such advertising is an integral step in the interstate movement of the goods and definitely becomes an instrumentality and part of interstate commerce.

5

A state tax on the gross receipts of advertising by out-of-state advertisers imposes a direct and substantial burden on interstate commerce and is unconstitutional and void. Such tax tends to impede and hamper and even destroy such advertising, and the interstate commerce in the advertised products.

6

A state tax on the gross receipts of advertising of all kinds, whether from local or foreign advertisers, is invalid in the ratio that the newspaper's or magazine's circulation in foreign states bears to its total circulation everythere. Appellant's challenge in this suit is limited, however, to the tax on the proceeds from out-of-state advertising.

7

A tax on the gross receipts of advertising, which makes no provision for segregating the local from the interstate business, is invalid.

8

The tax imposed by Chapter 7 of the New Mexico Special [fol. 59] Session Laws of 1934, levying a tax on the gross receipts of advertising in newspapers and magazines, is unconstitutional and void, insofar as it attempts to levy a tax on advertising from out-of-state advertisers, and furthermore, is unconstitutional and void on all advertising to the extent that the foreign circulation of the newspaper or magazine bears to its total circulation everywhere.

9

The tax on newspapers and magazines levied by Chapter 7 of the New Mexico Special Session Laws of 1934 is not levied on the publication of newspapers or on the particular contract that might be executed for advertising, but on the service performed by the newspaper or magazine in transmitting intelligence from said newspaper or magazine to its subscribers and readers residing in numerous states of the Union; in other words, the tax is on the business of advertising.

10

The Supreme Court of New Mexico erred in refusing to hold Chapter 7 of the New Mexico Special Session Laws of 1934 invalid and unconstitutional insofar as said act attempts to levy a tax on the gross receipts of newspapers and magazines received from advertisers residing in other states of the Union than New Mexico, and in refusing to establish the aforementioned points on which appellant relied and now relies, and in affirming the final judgment of the District Court of Santa Fe County, New Mexico.

Appellant specifies the following parts of the record which it thinks necessary for the consideration of the aforementioned points, and which need be printed by the Clerk for the hearing of the case:

[fol. 60]

Title of Paper	Page in Transcript
Amended Complaint	1 et seq.
Demurrer	8 et seq.
Petition to Amend the Amended Complaint by Interlineation	9 et seq.
Order Permitting Amendments to Amend Complaint by Interlineation	11
Final Judgment, Order Overruling Demurrer and Allowing Appeal	11 et seq.
Opinion of Supreme Court in cause No. 4210	16 et seq.
Judgment of Reversal of Supreme Court in cause No. 4210	30
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Order Sustaining Demurrer	33
Refusal and Inability by Plaintiff to Plead Further	33
Motion for Final Judgment	34
Final Judgment	35 et seq.
Opinion of Supreme Court in cause No. 4310	40 et seq.
Judgment of Affirmance of Supreme Court in cause No. 4310	42
Petition for Appeal to Supreme Court of the United States, Assignment of Errors and Prayer for Reversal	43 et seq.
Order Allowing Appeal	45

D. A. Macpherson, Jr., Counsel for Appellant, 810 First National Bank Building, Albuquerque, New Mexico.

[fol. 61] Proof of Service

STATE OF NEW MEXICO,
County of Bernalillo, ss:

D. A. Macpherson, Jr., of lawful age, on oath states that he is attorney for the above named appellant and that on the 9th day of August, 1937, he made service of appellant's statement of points to be relied upon and designation of parts of the record to be printed upon the above named appellees by depositing a true and correct copy thereof in the United States Post Office at Albuquerque, New Mexico, enclosed in a sealed envelope, and addressed to Frank H. Patton, Attorney General of New Mexico,

Santa Fe, New Mexico, Attorney for the above named appellees, postage fully prepaid, said service being in accordance with the statutes of New Mexico.

D. A. Macpherson, Jr.

Subscribed and sworn to before me this 9th day of August, 1937. E. A. Polansky, Notary Public. My commission expires Aug. 6, 1940. (Seal.)

[fol. 62] [File endorsement omitted.]

Endorsed on cover: Enter J. R. Modrall. File No. 41,-803. New Mexico Supreme Court. Term No. 322. Western Live Stock, A Partnership composed of Frazier Biggs and D. F. Biggs, appellant, vs. Bureau of Revenue and John A. Bingaman, Commissioner of Revenue. Filed August 16, 1937. Term No..322, O. T., 1937.

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Post Printing & Publishing Co. v. *Brewster*, 246 Fed. 321	4
State v. *Salt Lake Tribune Publishing Co.*, 249 Pac. 474, 48 A. L. R. 553	4
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 322

WESTERN LIVE STOCK, A PARTNERSHIP COMPOSED OF FRAZIER BIGGS AND D. F. BIGGS,

Appellant,

vs.

BUREAU OF REVENUE AND JOHN A. BINGAMAN, COMMISSIONER OF REVENUE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO.

STATEMENT AS TO JURISDICTION.

Appellants publish a monthly livestock magazine at Albuquerque, New Mexico, known as "Western Live Stock". It has a general circulation in New Mexico and other States. One of its chief sources of revenue is advertising. Appellants solicit and publish, under contracts, advertisements of products manufactured elsewhere than in New Mexico, such products to be sold, shipped and transported from the manufacturer to the customer. These out-of-State or foreign advertisements are obtained by appellants both through personal solicitation by its own repre-